

UCRA Industry Advisory Subcommittee
Comments on Documents Supplied to the UCR Board
by Scott Morris, August 26, 2016

The following documents were distributed to the members of the UCR Board in an email from Scott Morris of Alabama on the evening of Friday, August 26:

Memo to the UCR Board from Scott Morris, partly in answer to an earlier email sent to the Board by Bob Pitcher, ATA, on August 22, 2016, on behalf of the Industry Advisory Subcommittee

A powerpoint presentation by Alex Leith of Bradley to the UCR Board

Articles of Incorporation for a UCR repository

Bylaws for an incorporated UCR repository (despite the designation carried by one of the attachments to the Morris email, the bylaws have not in fact been supplied)

A corporate resolution to be file din lieu of an organizing meeting of an incorporated UCR repository

A draft contract between the Board and an incorporated UCR repository (there are marked-up and clean versions of the draft)

The Industry Advisory Subcommittee offers the following comments on these documents.

The Morris Memo

The memo is essentially in two sections.

ONE - This section lays out four reasons why a UCR repository needs to be formed and incorporated.

Clarity for contracting and employment

The memo tacitly admits there have been no problems in this regard so far, and is not specific about what such problems might come up, but perhaps this point is something to balance against other relevant factors.

More “control” over administration of the program

The reasoning here is unconvincing. How will the insertion of another layer – with different management – between the Board and the entities that do the work – improve “control”? The only relevant control is the Board’s, and the proposed structure *won’t* improve the Board’s control – quite the contrary. Direct employment is not the only other option: As of now, the Board contracts out some services. It has done this without evident problems for years now, while Board members and other volunteers handle other duties. Nevertheless, it may be that more “control” is in fact the issue here.

Additional liability protections

To the extent this is a real problem, and these days it can't be wholly discounted, there is insurance for this sort of thing. This is a consideration for the Board members now, who, as the memo points out, could be sued today and have to incur expenses in defending ourselves, even though the outcome should be positive for us. A corporation should have such insurance too. And even if Alabama has a law immunizing and indemnifying the officers of non-profits, surely not all states do, and their courts might not honor an Alabama statute. In short, with the availability of insurance, incorporation seems merely to add an unnecessary layer to UCR administration.

Administration suggested conversion of Plan to non-profit with a co-opting Board

This can hardly be taken as a serious argument.

TWO – this section characterized (for the most part fairly) the IAS's concerns about incorporating

Incorporation would not lessen the work of the Board members who will be closely involved with the new company

The point is made that the Board should not be “running” the “organization”; that the Board's function is to set UCR policy (and no more). But, even apart from the real difficulty of drawing a line between policy and (mere) administration, is this really so? Doesn't the Act really establish to Board to “run” UCR, and envision very close oversight of all its functions, even those which the Board may see fit to contract out? In addition, the memo is very strong to the effect that no decision has been made as to the structure of the new corporation. That decision, however, is in fact critical on whether the UCR Board will be able to exercise any realistic oversight and, yes, “control” of the program. Continued proper control of those functions should not be a major effort for the Board members. With one exception, which Scott Morris himself undertook in handling the UCR accounting function, the actual running of the entire UCR program has not noticeably taxed the Board members very much over a period of more than a decade. The IAS point stands: if the new corporation is to be at all transparent to the Board, a mix of Board members will have to be closely involved in “running” it.

There may be problems with the Board hiring employees directly

While this could be true – although it's far from established fact – the IAS is not recommending that the Board hire directly; the Board has successfully contracted out some work that it cannot or should not be obliged to perform itself, and the Board can continue to do that – for which incorporation is simply not necessary.

Just because IRP and IFTA have incorporated repositories is no reason for UCR to have one

The memo grants this point – which is obvious but still valid. We believe it's important to make this point explicitly. IRP and IFTA were not supplied by federal statute, *as UCR is*, with a ready-made governing board, endowed with full authority to administer an underlying program. IRP and IFTA have had to devise repository structures for themselves (and both have chosen membership corporate structures). Neither organization did so at once, however; it was only the experience of several years that convinced the states and provinces that they needed repository organizations to carry on their business under IRP and IFTA. UCR's experience over the past decade, on the other hand, appears to us to require no such step to be taken. UCR's experience to date simply does not demonstrate the need for a separate repository function, incorporated or otherwise. The Board – along with other volunteers – perform the necessary functions, including the required oversight of services contracted out.

Contracting out necessary services is working well for the Board

The memo also grants this point, but goes on to argue that Board members are overseeing those contractors and activities, and “this is not a proper role of a board member and poses risk to both the Plan and the industry.” Oh? Why is it not a proper role for a *UCR Board member*? Small business corporations are typically run by their corporate officers. Moreover, the peculiar expertise needed to run many aspects of the UCR program would seem to require the closest participation of Board members – or persons of similar knowledge, interests, and experience – in those operations. Anyhow, isn't it just the point that UCR is *not* a corporation, and doesn't it follow that the UCR Board is *not* a corporate board, for which this point might – at least for some corporations – have some validity? It is risky to attribute an intent to Congress when the legislative record for the Act is so lacking, but it does seem to us that the Act sets up the Board basically to run all aspects of the UCR program. The duties of the UCR Board members are not onerous or “unfair,” or if the members perceive them to be, they can resign, and let others - with the expertise proper for UCR, of course – take over for them.

The “risk to the Plan” is said to be that the Plan currently depends on a few volunteers who may move on and leave UCR in the lurch. This argument begs a couple of questions. First, none of us serve on the Board without the approval of our employers, whose interests, in one way or another, are involved, and who compensate us for the time we spend on UCR matters. UCR is a small, rather simple program that doesn't require the work of many volunteers, or the extreme efforts of anyone. Yes, there may be turnover, but if states or industry actually do leave the Plan in the lurch, that will say something about their commitment to the UCR program. Second, whoever is running the UCR program will need quite specialized knowledge; the program is, after all, rather an oddity. Turnover in either an incorporated repository or an independent contractor that has been running aspects of the UCR program more or less out of view of the Board, could easily be more upsetting for UCR than turnover on the Board. After all, all Board members know – more or less – what other members are up to with respect to the program, and the Act provides for an orderly transition when Board vacancies occur.

The “risk to the industry”: “Industry appears to be happy with how the current subcommittee structure is administering the UCR Plan....” Industry is not “happy” with *any* aspect of UCR. Industry would like to see UCR go away. The industry representatives on the UCR Board, however, have a certain fiduciary duty to UCR, which obliges them to protest a plan of incorporation which seems very likely to result in a real loss of transparency in how the UCR program is administered, and because of that, to bring UCR and its Board, sooner or later, into real trouble.

Unfair to subcommittees: Members of the subcommittees are said to be overburdened with UCR duties for which they are uncompensated. Both parts of this assertion appear to us wholly unjustified.

The final paragraphs are difficult to characterize shortly, and seem to miss the points made by the IAS.

The IAS made its comments in the absence of any real idea of what structure was to be proposed for the UCR repository corporation. We are still in the dark on that point, which is a critical one. The main point of this part of the IAS comments was that the success of the UCR program depends to a great degree not only on the competent administration of the program, but on its administration being regarded, by insiders and outsiders alike, as competent. Currently, with the Board essentially running the day-to-day operations of the UCR program in many respects (essentially all respects, aside from the Indiana system, which has safeguards of its own, and the UCR accounting function, which can be appropriately segregated from other duties and has been contracted to professionals), both the competence and the necessary *transparency* exist.

Yes, it has not been easy to attract the active attendance of many of the participating states (for whom UCR is quite evidently of very minor importance), but any Board member, any state, and anyone else can see what’s going on with UCR if they want to. The IAS message referred in this respect to the repositories of IRP and IFTA, whose structure permits the necessary transparency with respect to their business. That has from time to time been *critical* to both organizations. The point of the IAS is that *if* a UCR repository function is to be incorporated, the corporate structure of that entity *must* allow for the same transparency if UCR is to continue to succeed.

The memo states strongly that the corporate board of the repository will not “run” the UCR program; the repository’s employees will do that, while the UCR Board will continue to set UCR policy.

This is awkward conceptually, and will prove to be even more problematic in practice, we believe. It appears that the corporate employees running the UCR program will not be responsible directly to the Board, but to the corporate board, which neither sets UCR policy nor runs the UCR program. And we have alluded earlier to the practical difficulties in a great many instances in distinguishing those decisions which involve UCR policy from those that don’t.

After all this, the same question remains:

Will incorporating a UCR repository function really confer any significant benefits on the UCR program?

And the IAS's answer remains: We can't see that it will.

Bradley Presentation

These slides make many of the same points as the Morris memo, and they are in fact a brief for incorporating a UCR repository rather than an even-handed presentation of the pros and cons – which is what Board members should be getting. It is obvious that the case for incorporation is nowhere nearly as clear as this presentation would have it.

Is it appropriate that UCR administrative funds have gone for the preparation of a piece that represents only the views of what is probably a minority of the Board?

Articles of Incorporation

Specifically, only articles VI and VII seem problematic, since they deal with undetermined aspects of corporate structure. More generally, however, the document begs the questions not only whether it would be appropriate to incorporate a UCR repository function, but whether UCR requires a separate repository function at all.

The IAS is unconvinced on these matters by any of the documentation and arguments so far submitted to the Board.

Corporate Bylaws

These have not so far been supplied to the Board.

Services Agreement

Given that any real discussion of a contract of this sort should follow on decisions of whether UCR requires a general repository function (other than that already successfully supplied by the Board), and whether such a thing, if needed, should be incorporated, the comments of the IAS will be, at this point, rather limited. However, these are among the provisions we believe to be problematic.

Sec. 3. On the one hand, the insistence in this language of the need for day-to-day supervision of the repository by the Board conflicts rather strongly with arguments for incorporation in both the Morris memo and the Bradley presentation. On the other hand, the Board should not be willing

to countenance the sort of daily relationship envisioned in (b) between a repository and any single Board member. This language serves to highlight how difficult it will be in practice to tell when a given decision impinges on the Board's UCR policy preserve.

Sec. 4.7. It has been observed more than once and by more than one member of the Board that UCR or a UCR repository has *no legal authority* to audit any carrier, and that an attempt by UCR or a repository to do so would be a waste of money and create trouble for the UCR program as a whole. *Why is this notion persisted in?*

Sec. 4.9. UCR does not require "promotion" or "marketing," and the implications here are troubling.

Sec. 5. UCR and a UCR repository have no more authority to *bill* a carrier than either has to *audit* a carrier. Quite apart from legal questions, states can perform such functions much more effectively and efficiently than UCR ever could. *If a given agency of a participating state has difficulty auditing or billing carriers for UCR compliance, it might be well for the state to consider shifting responsibility for the program to another of its agencies or to abandoning its UCR participation altogether.*

Sec. 8 If provisions such as these ever come to be implemented, insurance covering Board members' legal fees should be included among these duties.

Sec. 10. Actually, funds received by the repository and unexpended must under the Act be returned to industry in the form of lower UCR fees.

Sec. 11. It may not be wise to provide for continuation of a budget at the same level in the event the Board is in disagreement. On the one hand, the threat of leaving the repository penniless may force a compromise, but on the other a portion of the Board could bar a needed change in the repository budget by refusing its agreement to a higher or lower amount, as the case might be.

Sec. 15. Provision might be made for actions necessary in the event UCR is repealed.